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8

9 IN THE UNITED STATES DISTRICT COURT
10 FOR THE EASTERN DISTRICT OF CALIFORNIA
11

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.

15 BRADLEY JAMES GHILARDUCCI,

16 Defendant.
17
18

CASE NO. 1:13-cr-00241-LJO

MEMORANDUM OF PLEA
AGREEMENT PURSUANT TO RULE
11(c) OF THE FEDERAL RULES OF
CRIMINAL PROCEDURE

DATE: TBD
TIME: TBD
CTRM: O'NEILL

19 Pursuant to Rule 11(c) of the Federal Rules of Criminal Procedure, the United States of
20 America, by and through Benjamin B. Wagner, the United States Attorney for the Eastern
21 District of California, and Assistant United States Attorney Michael G. Tierney, and Defendant,
22 BRADLEY JAMES GHILARDUCCI, and his attorney, Eric Fogderude, have agreed as follows.

23 This document contains the complete Memorandum of Plea Agreement ("Plea
24 Agreement") between the United States Attorney's Office for the Eastern District of California
25 ("Government") and defendant BRADLEY JAMES GHILARDUCCI regarding this case. This
26 Plea Agreement is limited to the United States Attorney's Office for the Eastern District of
27 California and cannot bind any other federal, state, or local prosecuting, administrative, or
28 regulatory authorities.

1 1. Charges.

2 The defendant acknowledges that he has been charged in a one-count indictment as
3 follows:

4 Receipt and Distribution of a Visual Depiction of a Minor Engaged in Sexually Explicit
5 Conduct, in violation of Title 18, United States Code, Section 2252(a)(2).

6 2. Nature, Elements and Possible Defenses.

7 The defendant has read the charges against him contained in the indictment, and those
8 charges have been fully explained to him by his attorney. Further, the defendant fully
9 understands the nature and elements of the crime in the indictment to which he is pleading guilty,
10 together with the possible defenses thereto, and has discussed them with his attorney.

11 The elements of the crime of Receipt and/or Distribution of a Visual Depiction of a
12 Minor Engaged in Sexually Explicit Conduct are:

13 First, the defendant knowingly received and/or
14 distributed;

15 Second, any visual depiction that had been mailed,
16 shipped, or transported in interstate or foreign
17 commerce;

18 Third, by any means, including by computer;

19 Fourth, the producing of such visual depiction(s)
20 involved the use of a minor engaging in sexually
21 explicit conduct; and

22 Fifth, the visual depiction was of such conduct.

23
24 3. Agreements by the Defendant.

25 (a) Defendant agrees that this plea agreement shall be filed with the court and
26 become a part of the record of the case.

27 (b) Defendant agrees to enter a plea of guilty to the sole count of the indictment,
28 which charges him with Receipt and Distribution of a Visual Depiction of a Minor Engaged in

1 Sexually Explicit Conduct in violation of Title 18, United States Code, Section 2252(a)(2).

2 (c) Defendant understands and agrees that he will not be allowed to withdraw his plea
3 should the Court fail to follow the government's sentencing recommendations.

4 (d) Defendant knowingly and voluntarily waives his Constitutional and statutory
5 rights to appeal his plea, conviction, restitution imposed, forfeiture order and sentence. This
6 waiver of appeal includes, but is not limited to, an express waiver of defendant's right to appeal
7 his plea, conviction, restitution imposed, forfeiture order and sentence on any ground, including
8 any appeal right conferred by 18 U.S.C. § 3742, and defendant further agrees not to contest his
9 plea, conviction, restitution imposed, forfeiture order and sentence in any post-conviction
10 proceeding, including but not limited to a proceeding under 28 U.S.C. § 2255.

11 (e) Defendant further acknowledges that his plea of guilty is voluntary and that no
12 force, threats, promises or representations have been made to anybody, nor agreement reached,
13 other than those set forth expressly in this agreement, to induce the defendant to plead guilty.

14 (f) Defendant agrees that his base offense level for Receipt of a Visual Depiction of a
15 Minor is twenty (20) under the United States Sentencing Commission Guidelines Manual
16 ("Sentencing Guidelines") § 2G2.2(b)(1)(B); and that the following adjustments apply because
17 he engaged in the conduct that forms the basis for the adjustment: two (2) levels for receiving
18 sexually explicit images of minors involving the use of a computer (§ 2G2.2(b)(6)); two (2)
19 levels for receiving sexually explicit images of prepubescent minors and/or children under
20 twelve years of age (§ 2G2.2(b)(2)); five (5) levels because the offense to which the defendant
21 pleads guilty involves more than 600 images (§ 2G2.2(b)(7)(D)); four (4) additional levels for
22 receiving sexually explicit images of minors that involve the portrayal of sadistic, masochistic or
23 other depictions of violence (§ 2G2.2(b)(4)). The defendant agrees that the base offense level
24 plus these adjustments equal an offense level of 33.

25 (g) Defendant agrees not to move for any downward adjustments in his offense level
26 under Chapters Two, Three, Four and/or Five of the United States Sentencing Guidelines. The
27 defendant understands and agrees that this agreement by him includes, without limitation, not
28 moving for a downward departure and/or variance of his offense level, criminal history category

1 or criminal history points as defined by the Sentencing Guidelines. The defendant retains the
2 right to argue under the factors at 18 U.S.C. § 3553(a) for a sentence below the applicable
3 guideline range due to his health concerns.

4 (h) Defendant understands that the Court must consult the Sentencing Guidelines (as
5 promulgated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984, 18
6 U.S.C. §§ 3551-3742 and 28 U.S.C. §§ 991-998, and as modified by United States v. Booker and
7 United States v. Fanfan, 543 U.S. 220 (2005)), and must take them into account when
8 determining a final sentence. Defendant understands that the Court will determine a non-binding
9 and advisory guideline sentencing range for this case pursuant to the Sentencing Guidelines.
10 Defendant further understands that the Court will consider whether there is a basis for departure
11 from the guideline sentencing range (either above or below the guideline sentencing range)
12 because there exists an aggravating or mitigating circumstance of a kind, or to a degree, not
13 adequately taken into consideration by the Sentencing Commission in formulating the
14 Guidelines. Defendant further understands that the Court, after consultation and consideration of
15 the Sentencing Guidelines, must impose a sentence that is reasonable in light of the factors set
16 forth in 18 U.S.C. § 3553(a).

17 (i) Defendant agrees to waive all rights under the "Hyde Amendment," Section 617,
18 P.L. 105-119 (Nov. 26, 1997), to recover attorneys' fees or other litigation expenses in
19 connection with the investigation and prosecution of all charges in the above-captioned matter
20 and of any related allegations (including without limitation any charges to be dismissed pursuant
21 to this Agreement and any charges previously dismissed).

22 (j) Defendant agrees that his conduct is governed by mandatory restitution pursuant
23 to 18 U.S.C. § 2259 and agrees to pay the victims the full amount of their losses as ordered by
24 the court and as a result of the defendant's conduct as charged in the indictment. Defendant
25 agrees that the mandatory restitution applies to those victims affected by the charges as set forth
26 in the indictment, including those counts being dismissed as part of the plea agreement and
27 regardless of whether or not the victims are included in the factual basis.

28 (k) Defendant agrees to make a full and complete disclosure of defendant's assets and
no

1 financial condition, and will complete the United States Attorney's Office's "Authorization to
2 Release Information" and "Financial Affidavit" within five (5) weeks from the entry of the
3 defendant's change of plea. The defendant also agrees to have the court enter an order to that
4 effect. The defendant understands that this plea agreement is voidable by the government if the
5 defendant fails to complete and provide the described documentation to the United States
6 Attorney's office within the allotted time.

7 (l) Defendant agrees to pay a special assessment of \$100 at the time of sentencing by
8 delivering a check or money order payable to the United States District Court to the United
9 States Probation Office immediately before the sentencing hearing. The defendant understands
10 that this plea agreement is voidable by the government if the defendant fails to pay the
11 assessment prior to that hearing.

12 (m) Defendant agrees to forfeit to the United States voluntarily and immediately all
13 right, title, and interest to any and all assets seized pursuant to 18 U.S.C. § § 2253(a)(1),
14 2253(a)(2), and 2253(a)(3), and Fed. R. Crim. P. 32.2(b)(1).
15 Those assets include, but are not limited to, the following:

- 16
- 17 (1) Gray computer tower bearing no serial or model number, seized from defendant
18 by law enforcement on or about September 5, 2012;
 - 19 (2) Black computer tower bearing no serial or model number, seized from defendant
20 by law enforcement on or about September 5, 2012; and
 - 21 (3) Large black computer tower bearing no serial or model number, seized from
22 defendant by law enforcement on or about September 5, 2012; and
23

24 Defendant agrees that the listed assets constitute property which contains visual
25 depictions mailed, shipped, or transported in violation of 18 U.S.C. § 2252(a)(2) or was used or
26 intended to be used in any manner or part to commit and to promote the commission of the
27 aforementioned violation, all in violation of 18 U.S.C. § 2253.

28 Defendant agrees to fully assist the government in the forfeiture of any seized assets or
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1 assets later determined to be forfeitable and to take whatever steps are necessary to pass clear
2 title to the United States. Defendant shall not sell, transfer, convey, or otherwise dispose of any
3 assets found to be connected to the criminal events charged in the Indictment.

4 Defendant agrees not to file a claim to any of the seized property in any criminal
5 proceeding or civil proceeding, administrative or judicial, which is or may be initiated.

6 Defendant agrees to waive right to notice of any forfeiture proceeding involving such property,
7 and agrees to not file a claim or assist others in filing a claim in such a proceeding.

8 The defendant waives the notice provisions of Fed. R. Crim. P. 7(c) and 32.2(a), waives
9 oral pronouncement of forfeiture at the time of sentencing and any defects in such
10 pronouncement that pertain to forfeiture, and waives any defenses to forfeiture, including any
11 defense predicated on the Ex Post Facto, Double Jeopardy, and Excessive Fines Clauses of the
12 United States Constitution. The defendant knowingly and voluntarily waives any right to jury
13 trial in any criminal or civil forfeiture proceeding.

14 (n) The defendant agrees that an additional component of a reasonable sentence will
15 be a term of supervised release of one hundred eighty (180) months.

16 (o) The defendant acknowledges that he has been advised, and he understands, that
17 under the Sex Offender Registration and Notification Act, a federal law, he must register and
18 keep his registration current in each of the following jurisdictions: where he resides, where he is
19 employed, and where he attends school. He understands that the requirements for registration
20 include providing his name, residence address, and the names and addresses of any places where
21 he is or will be an employee or student, among other information. He further understands that
22 the requirement to keep the registration current includes informing at least one jurisdiction in
23 which he resides, is an employee, or attends school not later than three business days after any
24 change in name, residence, employment, or student status. The defendant has been advised, and
25 understands, that failure to comply with these obligations subjects him to prosecution for failure
26 to register under federal law, 18 U.S.C. § 2250, which is punishable by a fine or imprisonment,
27 or both.

28 (p) If the defendant's conviction on the count to which he is pleading is ever vacated
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1 at the defendant's request, or his sentence is ever reduced at his request, the government shall
2 have the right to: (1) prosecute the defendant on any of the counts to which he pleaded guilty; (2)
3 reinstate any counts that may be dismissed under this agreement; and (3) file any new charges
4 that would otherwise be barred by this agreement. The decision to pursue any or all of these
5 options is solely in the discretion of the United States Attorney's Office. By signing this
6 agreement, the defendant agrees to waive any objections, motions, and defenses he might have to
7 the government's decision, including Double Jeopardy. In particular, he agrees not to raise any
8 objections based on the passage of time with respect to such counts including, without limitation,
9 any statutes of limitation or any objections based on the Speedy Trial Act or the Speedy Trial
10 Clause of the Sixth Amendment.

11 If it is determined that the defendant has violated any provision of this Agreement or if
12 the defendant successfully moves to withdraw his plea: (1) all statements made by the defendant
13 to the government or other designated law enforcement agents, or any testimony given by the
14 defendant before a grand jury or other tribunal, whether before or after his Agreement, shall be
15 admissible in evidence in any criminal, civil, or administrative proceedings hereafter brought
16 against the defendant; and (2) the defendant shall assert no claim under the United States
17 Constitution, any statute, the Federal Rules of Criminal Procedure, Rule 410 of the Federal Rules
18 of Evidence, or any other federal rule, that statements made by the defendant before or after this
19 Agreement, or any leads derived therefrom, should be suppressed. By signing this Agreement,
20 the defendant waives any and all rights in the foregoing respects.

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22 4. Agreements by the Government.

23 (a) The government will recommend a three-level reduction in the computation of his
24 offense level if the defendant clearly demonstrates acceptance of responsibility for his conduct as
25 defined in Section 3E1.1 of the United States Sentencing Commission Guidelines Manual.

26 (b) The government agrees that the defendant's base offense level for Receipt of a
27 Visual Depiction of a Minor is twenty (20) under the Sentencing Guidelines § 2G2.2(b)(1)(B);
28 and that the following adjustments apply because the defendant engaged in the conduct that

1 forms the basis for the adjustment: two (2) levels for receiving sexually explicit images of
2 minors involving the use of a computer (§ 2G2.2(b)(6)); two (2) levels for receiving sexually
3 explicit images of prepubescent minors and/or children under twelve years of age
4 (§ 2G2.2(b)(2)); five (5) levels because the offense to which the defendant pleads guilty involves
5 more than 600 images (§ 2G2.2(b)(7)(D)); four (4) additional levels for receiving sexually
6 explicit images of minors that involve the portrayal of sadistic, masochistic or other depictions of
7 violence (§ 2G2.2(b)(4)). The government agrees that the base offense level plus these
8 adjustments equal an offense level of 33.

9 (c) The government agrees to recommend that the defendant be sentenced to
10 imprisonment for a term within the applicable Guidelines range. The Government acknowledges
11 that the defendant may argue under the factors at 18 U.S.C. § 3553(a) for a sentence below the
12 applicable guideline range due to his health concerns.

13 (d) The government agrees that an additional component of a reasonable sentence
14 will be a term of supervised release of one hundred eighty (180) months.

15 (e) Irrespective of the government's agreement as set forth in paragraph 4(c), the
16 defendant understands and acknowledges that if the defendant violates any condition of pre-trial
17 release that the government is free to move and/or argue that the defendant's condition of release
18 be removed and that the defendant be detained pending further proceedings. To the extent that
19 the defendant is ordered detained, the government's recommendation as set forth in paragraph
20 4(c) is revised to include imprisonment for the time spent in custody or its imprisonment
21 recommendation set forth in that paragraph, whichever is greater.

22 (f) The defendant acknowledges and understands that the government makes no other
23 representations to him regarding sentencing, including regarding fines, the restitution owed,
24 whether any other specific offense characteristics apply to her conduct under Chapter Two of the
25 Sentencing Guidelines, whether additional enhancements or reductions apply under Chapter
26 Three or Five of the Sentencing Guidelines, or his criminal history or criminal history points
27 under Chapter Four of the Sentencing Guidelines, and the defendant understands that the
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1 government is free to comment and to make recommendations to the court and the probation
2 office regarding those matters.

3
4 5. Factual Basis.

5 Defendant will plead guilty because he is in fact guilty of the crime set forth in the
6 indictment. Defendant also agrees that the following are the facts of this case, although he
7 acknowledges that, as to other facts, the parties may disagree:

8 Defendant, beginning on an unknown date no later than in or about
9 February 2012 and continuing through approximately September 2012, in
10 Kern County, within the State and Eastern District of California and
11 elsewhere, did knowingly receive and distribute via the internet one or
12 more visual depiction(s), the producing of which involved at least one
13 minor engaging in sexually explicit conduct, as defined in Title 18, United
14 States Code, Section 2256, which depiction had been transported in
15 interstate or foreign commerce, had been sent or received using any means
16 or facility of interstate or foreign commerce, or which contained materials
17 which had been mailed, shipped, or transported in interstate or foreign
18 commerce by any means, including computer, specifically: the defendant,
19 using a computer, internal hard drive and modem, received and distributed
20 via the internet one or more such visual depiction, all in violation of Title
21 18, United States Code, Section 2252(a)(2). Several of the images
22 depicted prepubescent minors, some were depictions of violence and/or
23 sadistic or masochistic conduct, and the total number of images the
24 defendant received was more than 600.

25 6. Potential Sentence.

26 The following is the maximum potential sentence which defendant faces as to the single
27 count of the indictment:

28 (a) Imprisonment.

29 Minimum: Five (5) years
30 Maximum: Twenty (20) years

31 (b) Fine.

32 Maximum: Two Hundred and Fifty Thousand dollars (\$250,000.00)

33 (c) Both such fine and imprisonment.

34 (d) Restitution

1 (e) Term of Supervised Release:

2 Minimum: Five (5) years

3 Maximum: Lifetime (18 U.S.C. § 3583(k))

4 (Should the defendant violate any of the terms of his supervised release, he can be
5 returned to prison for the period of supervised release actually imposed by the
6 Court or five years, whichever is less.)

7 (f) Penalty Assessment.

8 Mandatory: One Hundred dollars (\$100.00).
9

10 7. Waiver of Rights.

11 Defendant understands that by pleading guilty he surrenders certain rights, including the
12 following:

13 (a) If defendant persisted in a plea of not guilty to the charges against him, he would
14 have the right to be represented by an attorney at all stages of the proceedings, and would have a
15 right to a public and speedy trial. The trial could be either a jury trial or a trial by a judge sitting
16 without a jury. Defendant has a right to a jury trial. However, in order that the trial be
17 conducted by the judge sitting without a jury, defendant, the government and the judge all must
18 agree that the trial be conducted by the judge without a jury.

19 (b) If the trial were a jury trial, the jury would be composed of twelve lay persons
20 selected at random. Defendant and his attorney would have a say in who the jurors would be by
21 removing prospective jurors for cause where actual bias or other disqualification is shown, or
22 without cause by exercising peremptory challenges. The jury would have to agree unanimously
23 before it could return a verdict of either guilty or not guilty. The jury would be instructed that
24 defendant is presumed innocent and that it could not convict him unless, after hearing all the
25 evidence, it was persuaded of his guilt beyond a reasonable doubt.

26 (c) If the trial were held before a judge without a jury, the judge would find the facts
27 and determine, after hearing all the evidence, whether or not he was persuaded of the defendant's
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1 guilt beyond a reasonable doubt.

2 (d) At a trial, whether by a jury or a judge, the government would be required to present
3 its witnesses and other evidence against defendant. Defendant would be able to confront those
4 government witnesses and his attorney would be able to cross-examine them. In turn, defendant
5 could present witnesses and other evidence on his own behalf. If the witnesses for defendant
6 would not appear voluntarily, he could require their attendance through the subpoena power of
7 the Court. At trial, the defendant would also have the right to assistance of legal counsel. If he
8 could not afford legal counsel, one would be appointed for him by the court at no expense to
9 him.

10 (e) At a trial, defendant would have a privilege against self-incrimination so that he
11 could decline to testify, and no inference of guilt could be drawn from this refusal to testify.

12 Defendant understands that by pleading guilty he is waiving all of the rights set forth
13 above and defendant's attorney has explained those rights to him and the consequences of his
14 waiver of those rights.

15 8. Questions by Court.

16 Defendant understands that if the court questions him under oath, on the record and in the
17 presence of counsel, about the offense to which he has pleaded guilty, his answers, if false, may
18 later be used against him in a prosecution for perjury.

19 9. Entire Agreement.

20 This plea of guilty is freely and voluntarily made and not the result of force or threats or
21 of promises apart from those set forth in this plea agreement. There have been no
22 representations or promises from anyone as to what sentence this Court will impose.

23 10. Court not a Party.

24 It is understood by the parties that the sentencing court is neither a party to nor bound by
25 this agreement and the sentencing judge is free to impose the maximum penalties as set forth in
26 paragraph 6. Further, in making its sentencing decision, the Court may take into consideration
27 any and all facts and circumstances concerning the criminal activities of defendant, including
28 activities which may not have been charged in the indictment.

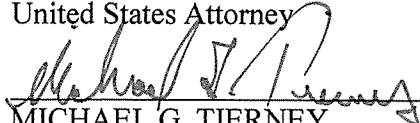
11. Presentence Report.

Defendant understands that the United States Probation Office is not a party to this agreement and will conduct an independent investigation of defendant's activities and his background. It will then prepare a presentence report which it will submit to the Court as its independent sentencing recommendation. In addition, the government will fully apprise the Probation Office, as well as the Court, of the full and true nature, scope and extent of the defendant's criminal activities, including information on his background and criminal history.

Dated: 1-27-14

BENJAMIN B. WAGNER
United States Attorney


By:


MICHAEL G. TIERNEY
Assistant U.S. Attorney

Dated: 1-27-14


BRADLEY JAMES GHILARDUCCI
DEFENDANT

Dated: 1-27-14


ERIC FOGDERUDE
Attorney for Defendant